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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1032

ROCKTON AND RION RAILWAY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 14–27) is reported in 54 F. Supp. 342. The opinion of the circuit court of appeals (R. 90–91) is reported in 146 F. 2d 111.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 11, 1944 (R. 91). The petition for a writ of certiorari was filed on March 10, 1945. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner's employees are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether petitioner is "an employer subject to the provisions of Part I of the Interstate Commerce Act" so that its employees are exempt from the overtime provisions of the Fair Labor Standards Act under Section 13 (b) (2).

STATUTES INVOLVED

The statutory provisions involved are Sections 3 (b) and (j) and 13 (b) (2) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, which read, in part, as follows:

> Sec. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall

be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 13.

* * * * *

(b) The provisions of section 7 shall not apply with respect to * * * (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

Also relevant are some of the provisions of the Interstate Commerce Act which are set out at R. 79–87.

STATEMENT

This suit was brought by the Administrator of the Wage and Hour Division to enjoin the petitioner from violating the minimum wage, maximum hour and record-keeping provisions of the Fair Labor Standards Act (Sections 6, 7, and 11). The facts as found by the district court (R. 27–38) are as follows:

Petitioner is a railway company organized in 1932 and existing under the laws of the State of South Carolina (R. 27). It operates a railroad in Fairfield County, South Carolina, between Anderson's Quarry and Rockton, a distance of approximately twelve miles (R. 28). At Rockton,

the railroad connects with the Southern Railway (R. 28). Petitioner utilizes the services of approximately thirty-two employees in the operation of its railroad; these include engineers, firemen, flagmen, section hands, construction crews, and clerical employees (R. 28–29).

Petitioner's railroad is operated for the purpose of serving the stone and granite industry along its tracks. From 1907, when the railroad was built, to 1932, it was owned and operated by the Winnsboro Granite Corporation (R. 29–34). Thereafter, the railroad has not only been largely owned or officered in common with the quarries and processing plants on its line (R. 29–34), but it also shares offices and equipment, including telephones, with the stone and granite interests (R. 33), performs work gratuitously for them (R. 33) and is operated to some extent by their employees (R. 19).

On April 15, ~~1948~~ 1932, the petitioner applied to the Interstate Commerce Commission, under Section 1 (18) of the Interstate Commerce Act, for authority to acquire and operate as a common carrier in interstate commerce that portion of the railroad extending from Rockton to Rion (R. 34).[1] The Commission denied the application, finding that "the present and future public convenience

[1] The major portion of the line, that from Rion to Anderson's Quarry, was not included in petitioner's application (R. 58).

and necessity are not shown to require the acquisition and operation by the Rockton and Rion Railway of the line of railroad described" (R. 62, 34; 189 I. C. C. 545). The Commission found that the railroad was a plant facility of the granite companies which, under the plan presented to the Commission, were merely attempting to change the legal status of the line from a plant facility to a common carrier (*ibid.*).

Petitioner nevertheless purchased the road and, following the denial of the certificate, operated it under a state charter as an intrastate common carrier (R. 34). In 1939, competitors of the quarry and granite companies served by petitioner instituted proceedings before the Interstate Commerce Commission against the Rockton & Rion Railway, the Southern Railway, and other connecting lines, alleging that the Rockton & Rion Railway was "unlawfully engaged in interstate commerce" and that, by reason of divisions accorded the Rockton & Rion Railway,[2] shippers along its line were unduly preferred to the prejudice of the complainants (R. 66, 35). The Commission was asked "to prescribe lawful rates for the future and to require defendants to cease and desist from transporting commodities in inter-

[2] Petitioner participates with connecting carriers in divisions of rates on intrastate commerce (R. 37). Section 13 of the Interstate Commerce Act confers on the Commission power to review intrastate rates, fixed by state commissions, to determine whether the intrastate rates result in unjust discrimination against interstate commerce (R. 68, 87).

state commerce" (*ibid.*). In its answer to the complaint, petitioner stated that it "specifically denies that it is operating without authority or is operating in Interstate commerce, *and upon information and belief specifically denies that it is subject to the provisions of the Interstate Commerce Act*" (R. 64).

The Commission, after formal hearing, again found that the operations of the Rockton & Rion Railway, so far as interstate commerce was concerned, was that of a plant facility of the shippers on its line (R. 69, 35). It dismissed the complaint, finding that petitioner was not shown "to be engaged in unauthorized interstate common-carrier operation" (R. 71, 35) and that its participation in joint rates and divisions on intrastate shipments as authorized by the Public Service Commission of South Carolina had not been shown to be in violation of Section 13 of the Interstate Commerce Act (R. 72, 35–36; 243 I. C. C. 105).

The petitioner is engaged in transporting over its line a large volume of shipments destined for points outside South Carolina, practically all such shipments being made by granite companies. When measured either on the basis of the number of shipments or of tonnage hauled, it is substantially engaged in transporting goods destined to out-of-state points, since on either basis a large volume of the goods transported by the petitioner is ultimately carried to out-of-state points (R. 36).

Petitioner is also engaged in transporting substantial shipments which have originated at out-of-state points. All such shipments are consigned to the granite companies located upon petitioner's line at Rion and at Anderson's Quarry. Petitioner also frequently handles incoming express shipments which have originated at out-of-state points as freight. These also are all consigned to the granite companies. (R. 36–37).

From November 2, 1939, to February 12, 1942, the petitioner did not pay some of its employees the minimum wages and overtime pay prescribed by the provisions of the Fair Labor Standards Act, and during that time failed to keep records of the hours worked each day and each week as to some of its employees, and of the hourly rate at which some of its employees were employed. From February 12, 1942, continuously to the date of the trial, petitioner employed some of its employees for work weeks in excess of the hours provided in the Act, and failed to compensate them for such overtime work at rates of not less than one and one-half times their regular rates of pay.

Concluding that the employees of the petitioner are engaged in commerce, and in the production of goods for commerce and that the petitioner, as to interstate shipments, is not furnishing services or transportation within the meaning of Part I of the Interstate Commerce Act, the district court

granted an injunction as prayed (R. 39–41). The Circuit Court of Appeals for the Fourth Circuit, in a *per curiam* opinion, affirmed (R. 90–91).

ARGUMENT

1. Both lower courts correctly held that petitioner's employees meet both of the alternative tests for determining the Act's coverage: (1) they are engaged in interstate commerce within the meaning of Section 3 (b) of the Act and (2) they are engaged in the production of goods for such commerce as defined in Section 3 (j) of the Act. Either of those two grounds is, of course, sufficient to bring petitioner's employees within the scope of the statute.

The admitted activities of these employees in moving incoming and outgoing interstate shipments on one stage of their interstate journey have been considered typical examples of interstate commerce under this and other statutes. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Philadelphia & Reading Ry. Co.* v. *Hancock*, 253 U. S. 284; *Hughes Bros. Co.* v. *Minnesota*, 272 U. S. 469; *Baltimore & Ohio S. W. R. R. Co.* v. *Settle*, 260 U. S. 166; *United States* v. *Erie R. R. Co.*, 280 U. S. 98.

Petitioner's employees are also engaged in the "production of goods for commerce" within the meaning of the Act. Their work in the operation of a plant facility for transporting goods in the

course of and in connection with their production by the stone and granite companies constitutes both "transporting" and a "process or occupation necessary to the production" of goods for commerce within the express terms of Section 3 (j) of the Act. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; cf. *Western Union* v. *Lenroot*, No. 49, decided January 8, 1945.

2. Petitioner, although engaged in interstate commerce, is not "an employer subject to the provisions of Part I of the Interstate Commerce Act" within the meaning of the Section 13 (b) (2) exemption. Part I of the Interstate Commerce Act applies only to carriers who not only engage in interstate transportation but do so as "common carriers." Section 1, pars. 1 and 2, 24 Stat. 379, as amended, 49 U. S. C. 1 (1) and (2). Accordingly Part I does not apply to a person engaging in interstate transportation *otherwise than as a common carrier* nor to one engaging in *intrastate* transportation as a common carrier.[3]

The courts below correctly held that petitioner, in its interstate operations, is a plant facility of the stone and granite companies and not a common carrier (R. 39, 91). This conclusion is based on the two prior determinations by the Interstate

[3] Petitioner operates under a state charter as an intrastate common carrier (R. 34), but in its interstate operations it is simply a plant facility, as pointed out more fully in the text.

Commerce Commission as well as on the independent findings of fact of the district court in this case. The weight accorded the Commission's decisions by the courts below was entirely appropriate, for determinations of this kind involve complicated and technical questions, peculiarly within the province of "a tribunal appointed by law and informed by experience." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 138. See also *Illinois Central R. R. Co.* v. *Interstate Commerce Comm.*, 206 U. S. 441, 454; *United States* v. *American Tin Plate Co.*, 301 U. S. 402.

Petitioner's contention, moreover, cannot be reconciled with its consistent course of conduct. Petitioner does not operate under a certificate of public convenience and necessity which interstate common carriers must obtain under Section 1 (18) of the Interstate Commerce Act. It does not comply with the various other requirements of that Act. It has denied, in a formal proceeding before the Commission, that it is subject to that Act, and it has taken particular pains to treat its interstate and intrastate transactions separately.[4] In short, while maintaining before the Interstate Commerce Commission that it is not subject to Part I of the Interstate Commerce Act, petitioner claims to be subject to it for the purpose of ob-

[4] R. 37–38; cf. *Interstate Commerce Commission* v. *Bellaire, Z. & C. Ry. Co.*, 77 Fed. 942 (C. C. S. D. Ohio).

taining an exemption from the overtime provisions of the Fair Labor Standards Act.

CONCLUSION

The decision below is correct. There is no conflict. We do not believe further review is required and accordingly we oppose the issuance of the writ.

Respectfully submitted.

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